

STATE OF MICHIGAN
COURT OF APPEALS

JUANITA RIVERA and JESUS M. RIVERA,

Plaintiffs-Appellants,

v

ESURANCE INSURANCE CO, INC.,

Defendant-Appellee.

UNPUBLISHED

July 24, 2007

No. 274973

Oakland Circuit Court

LC No. 2005-071390-CK

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendant's motion for summary disposition. We affirm.

I. FACTS

Plaintiff¹ was injured in an automobile accident in December 2003. Defendant insured plaintiff, but the other driver, Lakeisha Carter, was uninsured. Plaintiff filed suit against Carter, which resulted in entry of a default judgment. Plaintiff then filed the instant action against defendant, alleging breach of contract for defendant's failure to pay noneconomic (pain and suffering) and economic (excess wage loss) damages under its policy.

Defendant moved for summary disposition, asserting that it was entitled to a judgment as a matter of law because plaintiff had not met the statutory threshold—she had not suffered a serious impairment of body function. Plaintiff filed a cross-motion for summary disposition, arguing that she was entitled to judgment as a matter of law because defendant was bound by the default judgment entered in the third-party case, wherein another judge of the court had concluded that plaintiff had suffered a serious impairment of body function. The trial court granted defendant's motion, concluding that plaintiff's injuries have not affected her general ability to lead her normal life.

¹ All references to "plaintiff" in the singular are to Juanita Rivera because Jesus Rivera's claim is derivative.

Defendant then moved for entry of an order of dismissal. But plaintiff objected, asserting that the trial court's decision regarding whether plaintiff suffered a serious impairment of body function did not dispose of the case because plaintiff was still entitled to excess wage loss benefits for the reduction in work hours she suffered as a result of her injuries. Plaintiff also moved for reconsideration of the trial court's grant of summary disposition on the issue of serious impairment of body function. The trial court heard oral arguments and concluded that defendant was entitled to summary disposition as to both of plaintiff's claims. As to plaintiff's excess wage loss claim, the trial court reasoned that while plaintiff had shown that her work hours had been reduced since the accident, she failed to show that the reduction was based on her injuries and not other causes, such as a downturn in the auto industry. Plaintiff now appeals.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.*

III. ANALYSIS

A. Serious Impairment of Body Function

Plaintiff first argues that the trial court erred in concluding that she has not suffered a serious impairment of body function. Specifically, plaintiff contends that her injuries have affected her general ability to lead her normal life. We disagree.

Under the no-fault act, "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

The issue whether a plaintiff has suffered a serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a). Otherwise, the determination whether the plaintiff suffered a serious impairment of body function is a question of fact for the jury. See *Kreiner v Fischer*, 471 Mich 109, 132; 683 NW2d 611 (2004).

In determining whether a plaintiff has suffered a serious impairment of body function, the trial court must consider the following: (1) whether an important body function of plaintiff has been impaired; (2) whether the impairment is objectively manifested; and (3) whether the

impairment affects the plaintiff's general ability to lead his or her normal life. *Id.* at 132-133. A plaintiff does not satisfy the first prong of the serious impairment test if an unimportant body function is impaired or if an important body function has been injured but not impaired. *Id.* at 132. Further, "[f]or an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis." *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), quoting with express approval SJI2d 36.11. Here, the trial court concluded that plaintiff's injury was an objectively manifested impairment of any important body function, and defendant has not challenged that decision in a cross-appeal. Therefore, the only element at issue here is whether plaintiff's injuries have affected her general ability to lead her normal life.

Under *Kreiner*, to determine whether a person is generally able to lead his or her normal life, this Court must consider whether the objectively manifested impairment has affected the overall course of the plaintiff's life. *Kreiner, supra* at 130-131. It must examine how, to what extent, and for how long the plaintiff's life has been affected by the impairment, looking at plaintiff's life both pre- and post-accident. *Id.* at 131. In addition, it may consider such factors as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Id.* at 133-134. However, self-imposed restrictions do not establish that an injury has affected a person's ability to lead his or her normal life. *Id.* at 133 n 17. Further, "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id.* at 137.

We conclude that the trial court did not err in granting defendant's motion for summary disposition because plaintiff has failed to meet the threshold of serious impairment of body function – she has failed to show that her general ability to lead her normal life has been affected by the injuries she sustained in the auto accident.

Plaintiff suffered injuries to her back and neck in the auto accident. While her doctor has imposed ongoing work restrictions² and she testified that it takes her longer to do her job, plaintiff has continued to work since the accident in excess of 40 hours per week. Additionally, while plaintiff testified that she is now unable to participate in many activities post-accident because of her injuries, such as bike riding, working out, gardening, and household chores, she has not been restricted from any of these activities by her doctor. Instead, these restrictions are

² Plaintiff's doctor opined as follows regarding plaintiff's limitations:

Physical labor work, lifting and carrying involved. Bending and stooping involved. Standing long hours. Was standing long hours, 1 hour and 45 minutes stretch; patient can't do it. For the rest of her life, she is limited from it. The patient may do minimal physical work, sedentary or desk job, with great flexibility in freedom, change in position and posture and freedom to change the height of the workstation also, should have greater freedom of flexibility and working hours. She may not work 40 hours every week consistently.

self-imposed, and self-imposed restrictions, based on real or perceived pain, are insufficient to establish an impairment. *Kreiner*, *supra* at 133 n 17. Therefore, even when viewing this evidence in the light most favorable to plaintiff, we conclude that there is no genuine issue of material fact as to whether plaintiff's injuries have affected her general ability to lead her normal life.

After *Kreiner*, it is not enough for plaintiff to show that her injuries had some effect on her life. Rather, she must show that her injuries affected the overall course of her life. *Kreiner*, *supra* at 130-131. "A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id.* at 137. Here, because the evidence presented by plaintiff does not show that the overall course of her life has been affected by her injuries, she has failed to meet the threshold of a serious impairment of body function.

Plaintiff further argues that the trial court erred in concluding that she did not suffer a serious impairment of body function because, under the doctrine of res judicata, defendant was bound by the default judgment entered against the uninsured driver in the third-party case, which stated that plaintiff did suffer a serious impairment of body function. Again, we disagree.

The doctrine of res judicata bars a second, subsequent action "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Sewell v Clean Cut Mgt*, 463 Mich 569, 575; 621 NW2d 222 (2001). In this case, the prior action was decided on the merits, *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006) (finding that a default judgment is a final decision on the merits), and the issue of serious impairment of body function was resolved in the first case in plaintiff's favor. However, both actions do not involve the same parties or their privies. Defendant was not a party to the third-party case. Therefore, for the doctrine of res judicata to apply, defendant must be in privity with Carter, the uninsured motorist. Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant in the first action. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). As to private parties, a privity includes a person so identified in interest with another that he represents the same legal right, such as a principal to and agent, a master to a servant, or an indemnitor to an indemnitee. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 15; 672 NW2d 351 (2003). That is not the case here. Defendant and the third-party tortfeasor's rights and interests are not the same; therefore, they are not in privity for purpose of the doctrine of res judicata.

B. Excess Wage Loss

We also reject plaintiff's argument that the trial court erred in granting summary disposition as to her excess wage loss claim.

Under MCL 500.3135(3)(c), damages are recoverable for “work loss . . . as defined in sections 3107³ and 3110⁴ in excess of the “daily, monthly, and 3-year limitations contained in those sections.” Further, an injured party may recover excess wage loss damages under MCL 500.3135(3)(c) even where the plaintiff has not met the threshold requirement necessary to

³ MCL 500.3107 provides, in part, as follows:

(1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than \$1,750.00 or more than \$5,000.00.

(b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed \$1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.

(c) Expenses not exceeding \$20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

⁴ MCL 500.3110(4) states, “Personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors’ loss is incurred.”

sustain an action for noneconomic damages under MCL 500.3135(1). *Ouelette v Kenealy*, 424 Mich 83, 86; 378 NW2d 470 (1985). However, a plaintiff may only recover for the “‘loss of income from work [he] would have performed’ if he had not been injured[,]” not loss of earning capacity *Id.* at 87 (citation omitted). Moreover, a plaintiff must show that he suffered wage loss as a result of the auto accident. See *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994).

In this case, the trial court heard oral arguments regarding plaintiff’s excess wage loss claim⁵ and concluded that defendant was entitled to summary disposition because plaintiff failed to show anything more than mere speculation that her reduction in work hours was caused by her injuries. We agree.

While plaintiff’s employment records reflect that she has indeed worked fewer hours since the accident in December 2003, there was evidence that plaintiff’s work hours fluctuated from year to year before the accident, and plaintiff has continued to work an average that is in excess of 40 hours per week since the accident. From our review of the record in this case, it would appear likely that the reduction in plaintiff’s work hours resulted from a lack of overtime. Therefore, plaintiff failed to show that her excess wage loss was a result of the injuries she sustained in the auto accident.

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette

⁵ The issue was raised at the hearing on the parties’ motions for entry of an order.